

***United States Court of Appeals  
for the Second Circuit***



**PETITIONER'S  
REPLY BRIEF**





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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals  
for the District of Columbia Circuit

FILED MAR 27 1978

GEORGE A. FISHER  
CLERK

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Docket No. 77-1547

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BRADFORD NATIONAL CLEARING CORPORATION and  
BRADFORD SECURITIES PROCESSING SERVICES, INC.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent,

NATIONAL SECURITIES CLEARING CORPORATION,

Intervenor  
in support of  
Respondent.

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PETITION FOR REVIEW OF AN ORDER OF THE  
SECURITIES AND EXCHANGE COMMISSION

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REPLY BRIEF FOR PETITIONERS

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RELATED CASE

This case is related to Bradford National Clearing Corporation and Bradford Securities Processing Services, Inc. v. Securities and Exchange Commission, No. 77-1199 ("Bradford I"). By this Court's Order of January 10, 1977, oral argument in both cases is to be heard on the same day and before the same panel.



UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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NO. 77-1547

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BRADFORD NATIONAL CLEARING CORPORATION and  
BRADFORD SECURITIES PROCESSING SERVICES, INC.

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent,

NATIONAL SECURITIES CLEARING CORPORATION,

Intervenor in Support  
of Respondent.

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Petition For Review Of An Order Of The  
Securities And Exchange Commission

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REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Petitioners' objections to the Commission's order approving the NSCC rules changes ("Rules Order") stand unre-



butted by Respondent. In their opening brief Petitioners argued that the Commission failed to identify and evaluate the significant burdens imposed on competition by the rules changes, failed properly to evaluate their necessity or appropriateness to further the purposes of the Securities Exchange Act of 1934 ("Act"), failed to apply a proper balancing test to weigh competitive burdens against perceived benefits, and that the Commission's approval of the rules changes prior to satisfaction of the conditions and elimination of the tying rules was inconsistent with its order approving the registration as a clearing agency of National Securities Clearing Corporation ("NSCC").

In responding to these arguments, Respondent has mischaracterized certain of Petitioners' arguments, misstated the Commission's obligations under the Act, attempted to gloss over the deficiencies in the Rules Order and has enunciated an erroneous standard for Commission actions pursuant to Section 19(b) of the Act. Intervenor NSCC (characterizing itself as "the party whose interests are directly affected") has attempted to shore up the Commission's order with extended justifications for the rules changes which either are irrelevant or, while perhaps plausible, were not relied on by the Commission in formulating its Rules Order. To their respective arguments, Petitioners thus briefly reply.



I.

THE COMMISSION HAS FAILED TO DEMONSTRATE  
THAT ITS APPROVAL OF THE RULES CHANGES  
IS CONSISTENT WITH THE ACT OR ITS PRIOR ORDER

Petitioners argued in their main brief that the Commission failed to carry out its obligations under the Act because it, inter alia, failed to perceive the anti-competitive implications of the instant rules changes, failed to evaluate their appropriateness or necessity and consequently failed to balance their anti-competitive impact against their necessity or appropriateness under the Act. (P.Br. 30-34, 36-43, 43-48.)\* Those competitive disadvantages to Petitioners include allowing NSCC to offer a comparison, clearance and settlement service for Amex and NYSE transactions that no other clearing agency can offer and allowing NSCC to make inroads into Petitioners' traditional customer base while Petitioner Bradford Securities Processing Services, Inc. ("BSPS") cannot compete for any of the market that is locked-in to NSCC. (Id. at 30-34.) The Commission has responded to those arguments by attempting to avoid the significant responsibilities to create a competitive clearing industry conferred on it by the Securities Acts Amendments of 1975 ("1975 Amendments") (id. at 12-16), by mere reference to its purported "quasi-legislative power" and "broad discretion" (R.Br. 3, 11-12), and by making the unfounded charge that Petitioners' statement regarding NSCC's great competitive advantages are "simply untrue."

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\* "P.Br. \_\_\_\_\_" refers to Petitioners' opening brief;  
"R.Br. \_\_\_\_\_" refers to Respondent's brief; and  
"I.Br. \_\_\_\_\_" refers to Intervenor's brief.



(R.Br. 15.) Petitioners submit that Respondent's positions are plainly contradicted by the express commands of the Act (e.g., Sections 17A(a)(2), 15 U.S.C. §78q-1(a)(2); 17A(b)(3)(F) and (I), 15 U.S.C. §78q-1(b)(3)(F) and (I); 25(a)(4), 15 U.S.C. §78y(a)(4)) and are unsupported by the Rules Order and record in this case.

A. The Commission's Statutory Obligations.

The question regarding the Commission's obligations under the Act have been extensively briefed both in this case and in Bradford I and we will not repeat Petitioners' arguments here. It must be emphasized, however, that the test here is not whether the Commission acted within broad statutory discretion as suggested by Respondent and Intervenor. (R.Br. 11-12; I.Br. 32, 36.)

Enactment of the 1975 Amendments changed the regulatory world in which the Commission is to oversee self-regulatory organizations such as clearing agencies. The 1975 Amendments expressly require the Commission to have due regard for the "maintenance of fair competition...among clearing agencies." Section 17A(a)(2), 15 U.S.C. §78q-1(a)(2). Actions by either the Commission or another clearing agency that impose any burden on competition must be justified as being "necessary or appropriate in furtherance of the purposes of the Act." Sections 17A(b)(3)(I) and 23(a)(2), 15 U.S.C. §§78q-1(b)(3)(I), 78w(a)(2). Moreover, the 1975 Amendments were "designed to force the Commission to focus with particularity on the competitive implications of each



regulatory requirement." Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S.249, S. Rep. No. 94-75, 94th Cong., 1st Sess. 14 (1975) (hereinafter "Report on S.249"). Moreover, an order (such as the instant Rules Order) must be supported by "substantial evidence." Section 25(a)(4), 15 U.S.C. §78y(a)(4). These statutory obligations, imposed on the Commission by the 1975 Amendments, plainly rebut Respondent's and Intervenor's assertion that approval of the instant rules changes was committed to the Commission's discretion.

We would also point out that the Commission's actions have recently been scrutinized by two Congressional subcommittees having responsibility to oversee the manner in which the Commission is implementing the 1975 Amendments. Those subcommittees have concluded that "the Commission is heading down the wrong road in the clearance and settlement area." Oversight of the Functioning and Administration of the Securities Acts Amendments of 1975, Report by the Subcommittee on Oversight and Investigations and the Subcommittee on Consumer Protection and Finance of the House of Representatives Committee on Interstate and Foreign Commerce, H.R. Committee Print No. 95-27, 95th Cong., 1st Sess. 8 (1977). In comparing what the 1975 Amendments contemplated to what the Commission has done, the subcommittees stated (id. at 4-5):



"Section 17A of the Securities Exchange Act of 1934, as added by the 1975 Amendments, directs the SEC to use its authority to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of transactions in securities. What was contemplated was one system composed of competing entities so linked together as to allow individual brokerage firms to conduct all of their clearance and settlement activities with one entity."

"What appears to be emerging, however, is something quite different...."

"Securities Exchange Act Release No. 13163 (Jan. 13, 1977) (the January order), and the brief filed by the SEC in the law suit challenging that order, set forth the SEC's reasons for approving the merger rather than choosing one of the alternatives for the creation of a national clearance and settlement system which were proposed at the SEC's hearings on the merger question. The subcommittees do not find those reasons persuasive."

Respondent and Intervenor both state the reasons for approving these rules changes depend on the validity of the Commission's order in Bradford I which designated the NSCC consolidation as the appropriate vehicle to carry out the mandate of the 1975 Amendments despite its obvious anticompetitive consequences. (R.Br. 17-19; I.Br. 27-30.) Respondent and Intervenor further state that as the questions of the competitive impact of NSCC's registration had been considered in the Commission's order in Bradford I issued some three months earlier, these questions need not be fully reexamined in the Commission's review of the rules changes. (Id.) These arguments are erroneous and propose



a standard for Commission review of clearing agency rule changes inconsistent with the Act. (Sections 17A(b)(3)(F) and (I), 15 U.S.C. §78q-1(b)(3)(F) and (I), 19(a), 15 U.S.C. §78s(a), and 19(b), 15 U.S.C. §78s(b).)

This Court by its January 10, 1978 order, has recognized that this case is related to Bradford I. If the Court reverses the Commission's order in Bradford I., then the appeal of the Rules Order will, in effect, be disposed of by such order. However, if the Court affirms the Commission's order in Bradford I., that decision will not necessarily determine the Court's decision in this matter. Section 19(a) of the Act, 15 U.S.C. §78s(a), sets forth the following standard for the Commission in determining whether to grant registration to a clearing agency: "The Commission shall grant such registration if it finds that the requirements of this title and the rules and regulations thereunder with respect to the applicant are satisfied." Section 19(b), 15 U.S.C. §78s(b), sets forth the following standard for the Commission in approving a proposed rule change by a clearing agency: "The Commission shall approve a proposed rule change... if it finds that such...is consistent with the requirements of this title and the rules and regulations thereunder applicable to such organization." The language in the two sections is similar but not the same. Congress intended that the Commission make a separate independent review of a clearing agency's application for registration and of each of that clearing agency's subsequent



rule changes. See, Report on S.249 at 128-129. The fact that there is a three month proximity between the granting of NSCC's clearing agency registration and the Rules Order does not relieve the Commission of its obligation to make a separate, complete and independent review of the rules changes to see whether, by themselves, the rules changes are "consistent with the requirements of this title."

*Must look at each rule anew*

B. Lack of Justification for the Rules Order.

In responding to Petitioners' arguments regarding the competitive impact of the instant rules changes, the Commission has chosen not to address the merits of those claims or engage in the analysis called for by the Act. (P.Br. 43-44.) Rather it has merely labelled Petitioners' statements as "untrue" (R.Br. 15) and mischaracterized Petitioners' argument that the timing and manner of the implementation of a national system are critical concerns that the Commission must address--as a plea for delay. (R.Br. 17.)

In their main brief, Petitioners stated that while the Amex and NYSE tying rules remain in effect, no clearing agency other than NSCC can compare, clear and settle its participants' NYSE and Amex listed transactions in a single account. In response, the Commission very carefully has stated that "the tying rules have not precluded the clearance and settlement of transactions through existing interfaces...." (R.Br. 15; emphasis added.) That response, however, does not make Petitioners' statement "untrue" for it is uncontroverted that only NSCC can compare Amex



and NYSE trades. So long as New York brokers, who constitute the vast majority of clearing customers, are thus "locked-in" to NSCC for comparison, they have little incentive to clear and settle anywhere else. Petitioners thus are barred from attracting the trade volume necessary to develop a continuous net settlement system and to offer one account processing.

Respondent and Intervenor both acknowledge the necessity for trade comparison. (R.Br. 15, I.Br. 23.) However, the record and the briefs of Respondent and Intervenor are silent on the point that the effect of the Rules Order, and particularly when taken in the context of the existing "tying rules", is to deprive other clearing agencies of the opportunity to compare trades executed by their participants on the NYSE and Amex. Further, elimination of the tying rules will not resolve this problem because of the continuing effect of the business customs and practices engendered by the "tying rules", which are being and will be exacerbated by the Special Representative Rule. The record and the briefs of Respondent and Intervenor do not reflect any consideration of Section 3(a)(23) of the Act, 15 U.S.C. §78c(a)(23), which defines a clearing agency as one which performs trade comparison, clearance and settlement or acts as a securities depository. A clearing agency may choose to perform only one of these clearance functions--comparison, clearance, or settlement. However, Congress clearly intended that no clearing agency desiring to perform one of these functions, such as comparison of NYSE and Amex trades

NY clearing  
kept to  
NSCC  
by  
the  
tying  
rule



for its participants, should be denied the right to do so except in quite limited circumstances, cf. §11A(c)(5), 15 U.S.C. §78k-1(c)(5); 17A(b)(3), 15 U.S.C. §78q-1(b)(3). Yet this is exactly what the Rules Order does. Such a tying or linking of comparisons for NYSE and Amex trades to NSCC is not necessary. This is confirmed by the ongoing interface between the NCC Division of NSCC and the Pacific Clearing Corporation for the comparison of over-the-counter trades executed between participants in these two clearing agencies.

The Commission failed to perceive the practical consequences of its Rules Order. Thus, this significant competitive burden on Petitioners and advantage to NSCC was not even addressed.

Contrary to Respondent's other contention Petitioners, in stressing the necessity for reasoned Commission decision-making in which the timing and long term implications of each step toward development of a national system are analyzed, have not merely argued in favor of delay. Petitioners have stated that crucial to their planning is a sound basis for determining how much time remains until NSCC begins Phase II and what will transpire before that occurs. For that reason, Petitioners have objected to NSCC and the Commission proceeding "piecemeal" without "an overall plan." (App. at 106.)

Nowhere in its brief does Respondent attempt to show that such piecemeal development is necessary or appropriate to achieve the purposes of the Act as required by Section 17A(b)(3)(I), 15 U.S.C. §78q-1(b)(3)(I). Rather, the Commission merely relies on

*why piecemeal*



the unsupported conclusion that the instant rules changes "implement" its prior order, permit brokers a wider choice of clearing facilities and enhance competition among clearing agencies. Even accepting that there may be some short term benefit in implementing the instant rules changes, the Commission in its Rules Order neither balanced those benefits against injury to Petitioners, nor attempted to evaluate the long term effects on the clearing industry of proceeding piecemeal as requested by NSCC.

The failure of the Commission to consider the timing sequence in which the conditions set forth in its order granting NSCC clearing agency registration and accordingly the propriety of issuing the Rules Order at the time it did is highlighted both by the record in this matter and subsequent developments. In the order granting NSCC clearing agency registration, the Commission stated that NSCC could meet the conditions in that order in 120 days. (App. p. 9.) Whereas, in the April 21, 1977 Commission meeting considering the Rules Order, a member of the Commission's staff indicated that it would take NSCC some 6 months to fulfill the conditions. (App. p. 107.) Later, in a December 28, 1977 letter to the Commission, NSCC set forth a plan that would result in meeting all the conditions by September, 1978, some 20 months after it was granted clearing agency registration.

4 MOS from late 1976  
then  
6 MO from April 77  
then  
10 MO from

The Commission has attempted to justify its omissions by urging the Court to defer to it when it is exercising ongoing oversight and points to hearings it had convened for March 7-10,

then  
10 MO from  
Dec. 1977



1978. (R.Br. 13; Act, Rel. No. 14411, 43 Fed. Rep. 4295.) If the Court wishes to consider this argument of the Commission, then it is necessary for the Court to review the record of those hearings. At those hearings several clearing agencies, besides Petitioner BSPS, stated that as matters now stand, if NSCC proceeds forward in the course it is taking, they could not long survive.\* (Public Hearings before the Securities and Exchange Commission on the Establishment of a National Clearance and Settlement System to Consider Why the Conditions Specified in the Commission's Order, Issued January 13, 1977, Granting Registration to National Securities Clearing Corporation have Not Been Satisfied (SEC File No. 600-15).)

Respondent's failure to answer Petitioners' argument plainly belies any contention that the Commission discharged its duties under the Act. Because the Rules Order contains no justification for allowing such piecemeal development, it should be reversed by this Court. Industrial Union Department, AFL-CIO v. Hodgson, 162 U.S. App. D.C. 331, 499 F.2d 467, 488 (1974); WAIT Radio v. Federal Communications Commission, 135 U.S. App. D.C. 317, 418 F.2d 1153, 1156 (1969) ("[A]n agency or commission must articulate with clarity and precision its findings and the reasons for its decisions") citing Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968).

Finally, Petitioners are incensed over Respondent's unsupported and unfounded statement that Petitioner BSPS's present

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\* These statements apparently contradict the suggestion by NSCC which pointed to the lack of protest to the Rules Order by other clearing agencies and concluded that the Rules Order would not have the anti-competitive effects Petitioners believe they do have. (I.Br. 31.)



incapacity to develop an interface is "voluntary." (R.Br. 16, 17 fn. 13.) As the Commission is well aware, by letter of August 24, 1977 Petitioner BSPS filed a proposed rule change to offer a full fledged trade comparison service for participants' trades in all securities. (File No. SR-BSPS-77-5.) This service would provide BSPS the trade data necessary to make it feasible to develop and offer a continuous net settlement system. In fact, BSPS's filing so indicated when it said: "This Rule Change is part of a program which the Corporation [BSPS] has adopted to develop and establish a full clearance and settlement system for all securities." (Emphasis added.) At the Commission staff's request BSPS made certain amendments to this filing, and the Commission filed notice of the filing in the Federal Register, Act, Rel. No. 14141, 42 Fed. Reg. 59139 (November 15, 1977). The Commission has requested and BSPS has consented to extensions until March 27, 1978 for the Commission to act on this filing. Recent conversations with members of the Commission staff lead counsel to believe that this filing will not be acted upon until May 1978 at the earliest. Frustrated in its efforts, BSPS filed a second rule change by letter of January 27, 1978 to offer a pilot program comparison service limited to trades in "exempt" securities to be offered to no more than 15 participants. (File No. SR-BSPS-78-1.) BSPS specifically asked for prompt Commission action on this filing so it could at least offer a limited service pending action on its filing to offer a full comparison service. This filing was published in the Federal Register, Act, Rel. No.

Since  
Aug  
24, 1977  
Bhas  
been  
trying  
to  
initiate  
a comparison  
service  
but  
has  
delayed



14465, 43 Fed. Reg. 7277 (February 21, 1978). The Commission has until March 28, 1978 to act on this filing. If BSPS cannot obtain trade data for its participants, such as by performing the trade comparison for them, it is not feasible, either from an economic or business point of view, to offer a continuous net settlement service. Yet, blocking BSPS from offering this necessary comparison service is the Commission whose brief attacks BSPS's action in this case because BSPS has failed to develop a continuous net settlement system. (Act, Section 19(b)(1), 15 USC §78s(b)(1).)

Even if BSPS should finally be allowed to offer a trade comparison service, there is reason to doubt whether NSCC would grant it the necessary interfaces the lack of which the Commission falsely asserts is solely due to BSPS. The order granting NSCC clearing agency registration does not provide that NSCC must grant BSPS such an interface either as a condition of NSCC's registration or later if BSPS develops certain clearing systems. The only place that can arguably be construed as granting BSPS such a right is the following sentence on page 56 of the Commission's brief in Bradford I: "As we have seen (page 35-36, supra), the Commission provided that clearing agencies such as BSPS are not precluded from obtaining an interface with NSCC when they have developed the requisite capacity (Order 90)." As noted before, the Commission has been unable to discharge its statutory obligations within the statutorily prescribed time frames, at least as regards BSPS, and NSCC has, for one reason or another,



experienced great delays in meeting the conditions for its registration. In light of this history, it is unclear, even if BSPS develops "the requisite capacity," when the Commission and NSCC would give BSPS the necessary interface. Since it is the Commission which has created this situation, we do not see how they can fairly argue that BSPS's inability to obtain an interface is "voluntary".

II.

INTERVENOR'S POST-HOC RATIONALIZATIONS  
FOR THE COMMISSION'S ORDER SHOULD BE  
REJECTED BY THIS COURT

Apparently, because it is concerned about the lack of a proper basis in the Rules Order for proceeding piecemeal and without an overall plan, Intervenor has attempted to justify that action in its brief. To justify immediate consolidation of Amex and NYSE listed bond clearing, Intervenor states that (I.Br. 11):

"Rather than modify two systems, which would be operated under different rules and would soon have to be dismantled and folded into the unified system of Phase II, NSCC determined to establish a single, more efficient interface system which could be put into effect at an earlier date (and therefore expedite the satisfaction of the interface condition to the Order granting registration) and would not later have to be changed."

Petitioners submit that Intervenor's justification should be rejected. Intervenor's technical justification for immediate consolidation, while perhaps plausible, appears nowhere in the record and the Commission's Order does not adopt it. Such post-



hoc rationalizations supplied by an Intervenor's counsel cannot support agency action. Braniff Airways, Incorporated v. Civil Aeronautics Board, 126 U.S. App. D.C. 399, 379 F.2d 453, 465 (1967). An administrative order must stand on its own recitals of facts and reasons. Burlington Truck Lines v. United States, 371 U.S. 156, 168-169 (1962); Securities and Exchange Commission v. Chenery Corporation, 332 U.S. 194, 196 (1947); WAIT Radio v. Federal Communications Commission, 135 U.S. App. D.C. 317, 418 F.2d 1153, 1158 (1969); Cable TV of Santa Barbara v. Federal Communications Commission, 428 F.2d 672, 681 (9th Cir. 1970).

As stated by this Court in the WAIT Radio case (418 F.2d at 1158):

"It may be that points raised on appeal by Commission Counsel would support its order if they had been set forth by the agency, but argument by counsel cannot take the place of an agency's statement of reasons or findings."

Where, as here, an intervenor attempts to justify the agency's order based on facts or reasons not expressly adopted by the Commission itself, such justification should not be accepted. This Court "cannot find a substitute for valid agency explanation in...the rationalizations of [intervenor's] counsel on appeal...." Braniff Airways Incorporated v. Civil Aeronautics Board, supra, 379 F.2d at 465.

Intervenor also engages in an extended justification of the Special Representative Rule based on its benefit to broker-dealers, (I.Br. 19-23.) That the rule may confer immediate



short-term benefit on one segment of the securities industry is, however, irrelevant to consideration of the question here.

One account processing is concededly beneficial and is to be made available to all clearing agency participants in Phase II. But, such benefit cannot alone support the Rules Order. Having found some benefit in the instant rule changes, the Commission ~~should have then determined whether that immediate benefit outweighed their long-term anti-competitive consequences. That the Commission failed to do.~~

Had it done so, however, the Commission would have found that the Special Representative Rule has long-term anti-competitive consequences. Its effect is to further lock-in the comparison of NYSE and Amex trades to NSCC (and perhaps perpetuate NSCC's captive comparison market even after elimination of the tying rules). The pro-competitive alternative is to develop a comparison interface so that a regional broker's trade executed by a correspondent broker on the NYSE or Amex could be compared, cleared and settled without any involvement of NSCC. A comparison interface is presently operated by Pacific Clearing Corporation for trades in the over-the-counter market and the Commission has shown no reason why such an interface could not be developed for exchange executed transactions.

Regarding the approach of the Commission in general, Intervenor argues that it was not necessary for the Rules Order to



recite detailed findings or to consider rejected alternatives. Intervenor states that because the Commission analyzed the issues raised by Petitioners in its open meeting and relied on confidential agency staff reports in coming to its conclusion, the Rules Order did not have to state fully the reasons for the Commission's action in this case. (I.Br. 34-35.)

Intervenor's argument that statements made in the open meeting and confidential staff reports support affirmance of the Rules Order leaves us somewhat dismayed. Neither Petitioners nor Intervenor (nor the Court) know the contents of the confidential staff reports and neither the Commission's Rules Order nor its brief in any way indicates that the Commission relied on confidential reports in coming to its decision. If those reports contained critical, but confidential, evidence the Commission surely would have made that clear in its Rules Order. In the absence of such a showing, an alleged confidential report cannot form the basis for affirmance of the instant order.

Nor does discussion at the open meeting support the Rules Order. Rather than showing that the competitive issues were fully explored, the open meeting demonstrates the lack of a proper basis for that order. When Commissioner Evans asked (App. at 114):

Is this being done in a way that jeopardizes [Petitioners'] ability to compete any more than it would if [NSCC] did it all at once and went into Phase II at one time



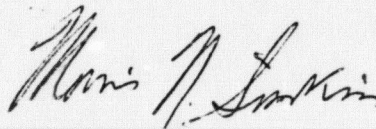
a member of the staff responded: "Now that I don't know." (Id.) The staff "didn't know" the answer to that question, and there is no indication in the record that the Commission otherwise knew the competitive implications of the rules changes. Therefore, the Commission could not possibly have properly evaluated the rules changes as required by the Act. For that reason alone, the Rules Order cannot be affirmed. Industrial Union Department, AFL-CIO v. Hodgson, 162 U.S. App. D.C. 331, 499 F.2d 467, 474-476 (1974).

Intervenor's reliance on the open meeting to support the Rules Order is misplaced, however, for yet another reason. The Commission itself has understandably attempted to disassociate the Rules Order from the discussion that took place during the open meeting. (R.Br. 19.) We know of no precedent that would allow affirmance of the Rules Order based on selected comments advanced post-hoc by an intervenor where the Commission itself has not only not adopted such comments but also has attempted to discredit other statements made by the staff at the same time. For that additional reason, Intervenor's argument should be rejected.

CONCLUSION

For the foregoing reasons, Petitioners request this court to reverse the Commission's Rules Order.

Respectfully submitted,



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